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Qwest
1801 California Street, 10th Floor
Denver, Colorado 80202
Phone 303 383-6649
Facsimile 303 896-1107

Craig J. Brown
Corporate Counsel

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MAY 23 2005

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., TW B-204
Washington, DC 20554

Federal Communications Commission
Office of Secretary

RE: *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25
In the Matter of July 1, 2005 Annual Access Charge Tariff Filings, WCB/Pricing 05-22

Dear Ms. Dortch:

Qwest Communications International Inc. ("Qwest") hereby files this ex parte submission in opposition to the request of the eCommerce & Telecommunications User Group ("eTUG") and the Telecommunications Committee of the American Petroleum Institute ("API") for the Federal Communications Commission ("Commission") to adopt an interim X-factor of 5.3 percent for interstate special access rates.¹ Because the Commission has already concluded that the record in this proceeding does not justify interim relief of the type sought by eTUG/API, it is clear that their request must be denied.

In the *Notice of Proposed Rulemaking*, the Commission sought detailed comment on the regulation of the interstate special access services provided by price cap local exchange carriers ("LECs"), given the impending expiration of the CALLS plan.² The Commission devoted approximately 20 pages of the *Notice* to a discussion of price cap regulation of

¹ Letter from Brian R. Moir, counsel for eTUG, and C. Douglas Jarrett, counsel for API, to Marlene H. Dortch, FCC (May 10, 2005) ("eTUG/API Request").

² *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, *Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 1994 (2005) ("Notice").

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these services, including the use and appropriate level of an X-factor for such services.³ For the most part, the Commission sought comment, rather than adopting tentative conclusions, on these issues. In the *Notice*, the Commission also denied AT&T's petition for interim relief, which had sought to reduce special access rates subject to Phase II pricing flexibility and impose a moratorium on pricing flexibility. The Commission concluded that the accounting rate of return data submitted by AT&T did not justify the relief that it sought.⁴ The Commission further determined that, "[g]iven the complexities of setting reasonable special access rates and their interrelationship with other price cap rates, [AT&T's] requested interim relief is not warranted by the record now before us."⁵

In light of these findings, there is simply no legal or factual basis for eTUG/API's request. eTUG/API relies exclusively on the accounting rate of return data that the Commission found was insufficient to justify an interim modification of the price cap LECs' special access rates.⁶ The record reflects that accounting rates of return for individual services are meaningless, given the arbitrary cost allocations that are inherent in such calculations.⁷ Various other concerns make it highly problematic to draw any conclusions regarding the reasonableness of a carrier's rates for a particular service based on the accounting rate of return for that service.⁸ Indeed, the *Notice* appears to recognize this fact.⁹ The Commission's request for comment on an interim X-factor in the *Notice* further confirms the inadequacy of the current record to make any changes to special access rates.¹⁰

³ *Id.* ¶¶ 59-127.

⁴ *Id.* ¶ 129.

⁵ *Id.* ¶ 130.

⁶ eTUG/API Request at 3. The unsubstantiated accounting rate of return data submitted by eTUG/API for three of the four largest price cap LECs suffers from the same shortcomings as the data earlier submitted by AT&T. Furthermore, Comptel/ALTS provides no factual support for eTUG/API's request. Letter from Michael H. Pryor, Counsel for Comptel/ALTS, to Marlene H. Dortch, FCC (May 13, 2005) ("Comptel/ALTS Letter").

⁷ Declaration of Alfred E. Kahn and William E. Taylor on Behalf of BellSouth Corporation, Qwest Corporation, SBC Communications, Inc., and Verizon, RM-10593, attached to Opposition of Qwest Communications International Inc. at 7 (filed Dec. 2, 2002) ("Kahn and Taylor Declaration").

⁸ *Id.* at 7-12.

⁹ *Notice*, 20 FCC Rcd 1994 ¶¶ 29, 129.

¹⁰ Comptel/ALTS all but acknowledges that eTUG/API's request is procedurally flawed, given that the Commission has not yet received comments and replies regarding any interim changes to the price cap LECs' special access rates. See Comptel/ALTS Letter at 3.

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There also is no merit to eTUG/API's suggestion that the Commission's adoption of a 5.3 percent X-factor ten years ago somehow provides a basis for reimposing that factor now. In reviewing the Commission's actions at that time, the D.C. Circuit concluded that the Commission had provided a "thorough and convincing explanation" for retaining its methodology for determining the X-factor on an interim basis.¹¹ No such justification for a 5.3 percent X-factor is possible here. Given the passage of time, and complete transformation of the telecommunications industry over the past decade, the Commission's adoption of a particular X-factor in 1995 has no relevance to whether there should even be an X-factor for special access services today.

As the Commission found in the *Notice*, the record in this proceeding does not support a finding that the price cap LECs' special access rates violate section 201 of the Communications Act, and the record is "inadequate for prescribing new special access rates pursuant to section 205 of the Communications Act."¹² As a result, eTUG/API's request to establish an interim X-factor for purposes of the annual access filing should be denied.¹³

Respectfully submitted,


Craig J. Brown

Counsel for Qwest Communications
International Inc.

cc: Thomas Navin (Thomas.Navin@fcc.gov)
Lisa Gelb (Lisa.Gelb@fcc.gov)
Tamara Preiss (Tamara.Preiss@fcc.gov)

¹¹ For quote and relevant associated surrounding text, see *Bell Atlantic Tel. Cos. v. FCC*, 79 F.3d 1175, 1203-04 (D.C. Cir. 1996).

¹² *Notice*, 20 FCC Red 1994 ¶ 130 (citation omitted).

¹³ The Commission should also reject eTUG/API's proposal to postpone the date of the annual access filing. Delaying the annual filing would impose substantial administrative burdens on price cap LECs. All price cap baskets would be affected by such a delay, including the Common Line basket. If the filing were delayed for two months, for example, Common Line rates for the filing year would have to be adjusted to reflect a ten-month, rather than twelve-month, filing period. Subsequently, rates would have to be readjusted to bring them back to a twelve-month cycle. These changes would also complicate the Commission's review of the annual filings.